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Supreme Court of the United States.

OCTOBER TERM, 1970.

No. ~~8041~~ 70-17

THOMAS S. EISENSTADT, AS HE IS SHERIFF OF SUFFOLK COUNTY, MASSACHUSETTS,
Appellant,
v.
WILLIAM R. BAIRD,
Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

JURISDICTIONAL STATEMENT.

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Supreme Court of the United States.

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Appellant,
v.
WILLIAM R. BAIRD,
Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

JURISDICTIONAL STATEMENT.

The appellant, the Sheriff of Suffolk County, Massachusetts, submits this statement pursuant to the provisions of Rule 15 of the Rules of this Court in support of his contention that this Court has jurisdiction to review the judgment and order of the United States Court of Appeals for the First Circuit referred to herein.

The Opinions Below.

The opinion of the Circuit Court of Appeals vacating the order of the District Court is reported at F. 2d (No.

7578, 1st Cir. July 6, 1970). The opinion of the District Court is reported at 310 F. Supp. 951 (1970). The opinion of the Massachusetts Supreme Judicial Court is reported at 1969 Mass. Adv. Sh. 727, 247 N.E. 2d 574 (1969). The opinions and judgments of the Courts herein referred to are reproduced as appendices to this statement.

Jurisdiction.

The civil action in the United States District Court for the District of Massachusetts was commenced by the filing of a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2241. After hearing, the Court dismissed the petition. Thereupon, the plaintiff (appellee herein) appealed to the United States Circuit Court of Appeals for the First Circuit. After hearing, that Court vacated the order of the District Court and remanded the action thereto with instruction to grant the writ of habeas corpus on July 6, 1970. A timely notice of appeal was filed with the Court of Appeals for the First Circuit on July 15, 1970.

The statutory provision believed to confer jurisdiction of the appeal on this court is 28 U.S.C. § 1254 (2).

Statutes Involved.

The Massachusetts statutes involved are: Mass. G.L. c. 272, § 21, as amended by Acts of 1966, chapter 265, § 3, which provides:

> "Except as provided in section twenty-one A, whoever sells, lends, gives away, exhibits, or offers to sell, lend or give away an instrument or other article intended to be used for self-abuse or any drug, medicine, instrument or article whatever for the prevention of conception or for causing unlawful abortion, or ad-

vertises the same, or writes, prints, or causes to be written or printed a card, circular, book, pamphlet, advertisement or notice of any kind stating when, where, how, of whom or by what means such article can be purchased or obtained, or manufactures or makes any such article shall be punished by imprisonment in the state prison for not more than five years or in jail or the house of correction for not more than two and one half years or by a fine of not less than one hundred nor more than one thousand dollars."

The text of this statute is found at pages 159-160, 1969 Pocket Part, Volume 44, Mass. General Laws Annotated (West Publishing Company).

And Mass. G.L, c. 272, § 21A, as inserted by Acts of 1966, c. 265, § 1, which provides:

"A registered physician may administer to or prescribe for any married person drugs or articles intended for the prevention of pregnancy or conception. A registered pharmacist actually engaged in the business of pharmacy may furnish such drugs or articles to any married person presenting a prescription from a registered physician.

"A public health agency, a registered nurse, or a maternity health clinic operated by or in an accredited hospital may furnish information to any married person as to where professional advice regarding such drugs or articles may be lawfully obtained.

"This section shall not be construed as affecting the provisions of sections twenty and twenty-one relative to prohibition of advertising of drugs or articles intended for the prevention of pregnancy or conception; nor shall this section be construed so as to permit the sale or dispensing of such drugs or articles by means of any vending machine or similar device."

The text of the statute is found at page 160, 1969 Pocket Part, Volume 44, Mass. General Laws Annotated (West Publishing Company).

Questions Presented.

Is the Massachusetts statute, G.L. c. 272, §§ 21, 21A, unconstitutional on its face as vague, arbitrary, discriminatory, overbroad, or lacking legitimate legislative purpose to the extent that it makes unlawful to give away to unmarried persons medicines and other articles for the prevention of conception?

Is the Massachusetts statute, G.L. c. 272, §§ 21, 21A, unconstitutional as applied to the appellee, William R. Baird, who, not being a registered physician, a registered pharmacist actually engaged in the business of pharmacy, or a registered nurse, was convicted for giving away certain contraceptive devices, to wit: vaginal foam, at a public lecture before an audience of approximately two thousand persons at Boston University?

Statement of the Case.

In April 1967, William R. Baird, the appellee herein, pursuant to an invitation, addressed a group of students at Boston University. On a demonstration board he exhibited various contraceptive devices and at the close of his lecture he invited members of the audience to come and help themselves. He personally handed an unmarried adult woman a package of vaginal foam. He was thereupon arrested and charged with exhibiting and delivering a contraceptive article. The appellee was indicted and convicted of exhibiting and distributing contraceptive devices in violation of Mass. G.L. c. 272, § 21. On appeal, the Massachusetts

Supreme Judicial Court unanimously held that the conviction for exhibiting contraceptive articles violated Mr. Baird's First Amendment rights. But by a 4-3 majority, the Court upheld the constitutionality of the provision against delivering as beyond the realm of free speech. *Commonwealth* v. *Baird*, Mass. Adv. Sh. (1969) 727 (May 1, 1969). On January 12, 1970, the United States Supreme Court denied a petition for writ of certiorari. *Baird* v. *Massachusetts*, 90 S.Ct. 580 (1970). Thereafter, a petition for writ of habeas corpus was filed in the United States District Court for the District of Massachusetts. Following a hearing, the petition was dismissed with opinion. *Baird* v. *Eisenstadt*, 310 F. Supp. 951 (1970). A claim of appeal having been filed, the United States Court of Appeals for the First Circuit issued a certificate of probable cause and ordered the appellee herein released on bail. After a hearing, the Court of Appeals entered a judgment vacating the order of the District Court and remanded the action with instruction to grant the writ of habeas corpus discharging Mr. Baird, *Baird* v. *Eisenstadt*, No. 7578 (1st Cir. July 6, 1970), and this appeal followed.

The Questions are Substantial.

A. G.L. C. 272, § 21, is a Valid Exercise of the Police Power.

Since 1879, when the Massachusetts Legislature enacted this statute* it has been a crime to distribute contraceptives. This statute was enacted under the police powers of the state and represents a law within this power to protect both morals and health. It is fatuous to argue that a law

* G.L. c. 272, § 21A, was enacted in 1966.

limiting distribution of contraceptives to the married does not bear a reasonable relationship to morals. The success or lack of success which such law has on the protection of morals should not be the measure of its constitutionality.

What radical change has occurred in the society in which we live to make such a law now unconstitutional? Have people acquired rights to extra-marital relations free of any public and criminal responsibility? If so, what becomes of our laws against fornication and adultery?

The Massachusetts Supreme Judicial Court said in *Commonwealth* v. *Allison*, 227 Mass. 57 (1917) at p. 62:

> "The statutes under which the several counts in this indictment are drawn contravene no provision of the constitution. Manifestly they are designed to promote the public morals and in a broad sense the public health and safety. Their plain purpose is to protect purity, to preserve chastity, to encourage continence and self-restraint, to defend the sactity of the home, and thus to engender in the State and nation a virile and virtuous race of men and women. The subject matter is well within one of the most obvious and necessary branches of the police power of the State."

Nothing relevant to this issue has occurred since 1917 to change the legislative purposes as delineated in *Commonwealth* v. *Allison, supra*. This statute is still designed "to promote public morals." Its purpose in protecting purity and chastity, is still viable in 1970 and even perhaps much more necessary than in 1917.

The Court below has adopted the specious argument of Baird that there is some "right" of the unmarried to have sexual intercourse free of unwanted pregnancy. Such a right does *not* exist except by an attempted judicial fiat. *Poe* v. *Ullman*, 367 U.S. 497, 553.

If such right exists, then our laws punishing fornication and adultery are necessarily unconstitutional. The case of *Griswold* v. *Connecticut*, 381 U.S. 479, at 498, acknowledges as "beyond doubt" the right of the state "to enact statutes regulating the private sexual lives of single persons."

The presumption of validity in favor of the statute places the burden on Baird to demonstrate its unconstitutionality. While Baird frequently refers to the rising rate of illegitimacy, he is conspicuously silent on statistics which might prove that the free and lawful distribution of contraceptives has reduced the rate of illegitimacy in those states which permit such distribution. The burden is his, not ours. In a word, Baird has failed to show that the statute does *not* bear a reasonable relationship to a proper object of legislative concern.

Furthermore, if sociological or economic changes have occurred with the passage of time making it desirable to take a "second look" at the problems, this is a function of the legislature. As Mr. Justice Black said in *Griswold* at p. 513, "... I do not believe that we are granted power by the Due Process Clause or any other constitutional provision or provisions to measure constitutionality by our belief that legislation is arbitrary, capricious, or unreasonable, or accomplishes no justifiable purpose or is offensive to our notions of 'civilized standards of conduct.' Such an appraisal of the wisdom of legislation is an attribute of the power to make laws, not of the power to interpret them."

Griswold lends no support to Baird's position because (1) *Griswold* dealt only with the *use*, not distribution, of contraceptives, (2) to married people only, (3) by a licensed physician. Baird argues for distribution to the unmarried, by anyone whether a licensed physician or an ordinary lay person. This tripartite distinction renders *Griswold* inapposite.

Moreover, the statute bears a direct relationship to the health of its citizens. As District Court Judge Julian in his opinion said:

> "A legislature has the constitutional power to limit the practice of medicine to qualified physicians. The statutes under attack deal with the distribution of contraceptive drugs and devices. It is a matter of common knowledge that contraceptive substances may have harmful effects on the health of those who use them and for that reason are still the subject of extensive medical research. The statutes in question have a clear relationship to the legislative purpose of safeguarding the health of members of the community by placing the distribution of such substances exclusively in the hands of registered physicians and pharmacists. The statutes therefore can reasonably be regarded as furthering an important and substantial governmental interest."

The Court below attempted to ridicule the "health argument" by asserting the "right" of the unmarried to the same professional assistance of physicians as afforded the married, and by characterizing the denial of professional help to the unmarried, "grossly discriminatory." This argument is fallacious because it is predicated on the totally untenable grounds that the unmarried have a "right" to indulge in the act of sexual intercourse which creates the need for professional contraceptive advice. This right just does not exist.

One might think after reading the opinion of the Court below that an unmarried person required this type of professional advice and service, as a result of accidentally contracting typhoid fever or diphtheria. It becomes important to remind ourselves that an unmarried person needs this type of professional advice only if he violates or contemplates the violation of the law.

B. Baird Has No Standing.

Baird argues the invasion of a fundamental right, a right of privacy of sorts. However, Baird is not a licensed physician nor does he enjoy any recognized professional or confidential relationship to any person. He is admittedly a married man. He has no standing to assert a right of privacy belonging to an unspecified segment of the population of unmarried persons. *Yazoo & Mississippi Valley Railroad Co.* v. *Jackson Vinegar Co.*, 226 U.S. 217 (1912).

C. The Assumption of Jurisdiction is Necessary.

Twenty-five states* have laws on contraception not entirely dissimilar to the Massachusetts statutes which are under review in this case. Baird has made no secret of the fact that he intends to continue to violate this statute. If arrested and prosecuted, Baird will necessarily seek the help of the Federal Court and succeed in preventing prosecution, leaving the Massachusetts authorities in a hopeless state of frustration.

Following the *Baird* case, the Massachusetts Supreme Judicial Court rendered its opinion in *Sturgis* v. *Attorney General*, Mass. Adv. Sh. (1970) 1139, 260 N.E. 2d 687 (June 29, 1970) again upholding the statute herein under review.

Conclusion.

For all of the above reasons, we submit that the questions presented on appeal are substantial and of grave public importance. The constitutionality of this type of statute

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*Arizona, Arkansas, Delaware, Hawaii, Idaho, Indiana, Iowa, Kentucky, Louisiana, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Jersey, Ohio, Oregon, Pennsylvania, Tennessee, Utah, Washington, West Virginia, Wisconsin.

has never been decided by this Court. Accordingly we request that probable jurisdiction be noted and that the matter be set down for argument.

Respectfully submitted,

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Appendix A.

United States Court of Appeals
For the First Circuit

No. 7578.

WILLIAM R. BAIRD,
PETITIONER, APPELLANT,
v.
THOMAS S. EISENSTADT,
As he is Sheriff of
Suffolk County, Massachusetts,
RESPONDENT, APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Before ALDRICH, *Chief Judge*,
McENTEE and COFFIN, *Circuit Judges*.

Chester C. Paris, with whom *Joseph J. Balliro* was on brief, for appellant.

Lawrence P. Cohen, Assistant Attorney General, with whom *Robert H. Quinn*, Attorney General, *John J. Irwin, Jr.*, Assistant Attorney General, Chief, Criminal Division, *Garrett H. Byrne*, District Attorney, Suffolk County, and *Joseph R. Nolan*, Assistant District Attorney, Suffolk County, were on brief, for appellee.

July 6, 1970.

ALDRICH, *Chief Judge*. Petitioner Baird brings this petition for habeas corpus to attack his conviction for violation of Mass. G. L. c. 272 § 21, *Commonwealth* v. *Baird*, 1969 Mass. A. S. 727, *cert. denied* 396 U.S. 1029, hereinafter *Baird*, on the ground that the statute, insofar as it is directed against contraceptives, is unconstitutional. The facts are these. In April 1967 petitioner, pursuant to an invitation, addressed a group of students at Boston Uni-

versity on the subject of contraception. On a demonstration board he exhibited various contraceptive devices, and at the close of his talk he invited members of the audience to come and help themselves. He personally handed to an unmarried adult woman a package of vaginal foam, a publicly advertised contraceptive. He was thereupon arrested and charged with a) exhibiting, and b) delivering, a contraceptive article.[1]

Following a trial, and a finding of guilty on both counts, the Superior Court pursuant to a Massachusetts procedural statute requested review by the Supreme Judicial Court of the constitutionality of the statute. That court unanimously held that the conviction for exhibiting contraceptive articles violated petitioner's First Amendment rights. By a 4-3 majority it upheld the constitutionality of the provision against delivery, holding, *inter alia*, that this went beyond free speech, and that the statutory proscriptions were severable. The court ruled that forbidding delivery of contraceptive articles was supportable as a legitimate protection of public health. Significantly, the majority said nothing on the subject of morals. Nor did

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[1] The statute, which contains a second section as the result of a 1966 amendment, reads as follows.

> "Except as provided in section twenty-one A, whoever sells, lends, gives away, exhibits, or offers to sell, lend or give away ... any drug, medicine, instrument or article whatever for the prevention of conception or for causing unlawful abortion ... shall be punished by imprisonment in the state prison for not more than five years or in jail or the house of correction for not more than two and one half years or by a fine of not less than one hundred nor more than one thousand dollars." (§21).
>
> "A registered physician may administer to or prescribe for any married person drugs or articles intended for the prevention of pregnancy or conception. A registered pharmacist actually engaged in the business of pharmacy may furnish such drugs or articles to any married person presenting a prescription from a registered physician. ..." (§ 21A).

Concededly petitioner was neither a physician nor a pharmacist.

the court address itself to the question why a married woman's health was to be protected by requiring medical assistance, and an unmarried woman's by denying it, a question more pressingly raised in *Sturgis* v. *Attorney General*, post.

The petition for habeas corpus was dismissed by the district court, with opinion. 310 F.Supp. 951. We issued a certificate of probable cause for appeal, and ordered petitioner released on bail.

Petitioner attacks the statute on a number of grounds. The first two need not detain us. His extensive argument that the First Amendment entitled him to deliver a contraceptive article as "symbolic speech" is less persuasive than the defendant's claim in *United States* v. *O'Brien* that he could emphasize an anti-war speech by burning his draft card. Even there the Supreme Court, as well as, in this respect, ourselves, was unimpressed by the argument that the right of free speech justifies the performance of an act which has been reasonably prohibited on independent substantive grounds. *United States* v. *O'Brien*, 1968, 391 U.S. 367. Equally unsupportable is the contention that the elimination of a small part of the statute, the provision against exhibition, destroys the statute as a whole. This is not an instance of judicial excision making the remainder difficult to interpret. Nor is this one of those "rarest of cases" where the statute has been so reduced in scope as to leave it pointless. *See United States* v. *Raines*, 1960, 362 U.S. 17, 23. The excision argument did not persuade the Massachusetts court, whose interpretation of the statute controls; nor does it us.

Petitioner's more substantive claims need considerable rephrasing. The issue before us is whether the statute "bears a real and substantial relation to the public health, safety, morals, or some other phase of the general welfare." *Sperry & Hutchinson Co.* v. *Director*, 1940, 307

Mass. 408, 418. Or, in the Commonwealth's words, it must be shown that the statute "does not bear a reasonable relationship to a proper legislative purpose, or . . . is . . . arbitrary and discriminatory." *Nebbia* v. *New York*, 1934, 291 U.S. 502, 537; *Meyer* v. *Nebraska*, 1923, 262 U.S. 390, 399-400.

The Commonwealth asserts two general purposes, health and morals. In resting its decision on the former the court said in *Baird*,

> "The Commonwealth has a legitimate interest in preventing the distribution of articles designed to prevent contraception which may have undesirable, if not dangerous, physical consequences." 1969 Mass. A.S. at 733.

More recently the court had occasion to expand upon this statement. In *Sturgis* v. *Attorney General*, 1970 Mass. A.S. ———, (6/29/70), plaintiffs, two qualified physicians specializing in gynecology, sought under Massachusetts practice a declaratory judgment that the statute is unconstitutional in that it prevents them from furnishing contraceptive assistance to their unmarried patients. The court, Justices Cutter and Spiegel dissenting as to the outcome, stated,

> "The Legislature is free to conclude that some harm may conceivably attend the employment of contraceptives devices . . . . [Hence] the prohibition against their distribution bears a real and substantial relation to the legislative purpose."

The court went on to say that *Griswold* v. *Connecticut*, 1965, 381 U.S. 479, post, affirmed "beyond doubt" the right of the state "to enact statutes regulating the private sexual lives of single persons."[2] The court, record-

[2] We note in passing that *Griswold*, in our opinion, in no way establishes "beyond doubt" that the present statute is constitutional. Even the statement on which the court relied came from the concurring opinion of a single justice. (381 U.S. at 498.)

ingly, upheld the statute in its full scope, as "protecting the public health."

While we agree with the generality of these observations as statements of principle, we are unable to find the statute to be an application thereof. Alternatively, if it could be thought to be intended for a proper purpose, we could not find, in the words of the Commonwealth quoted earlier, that it bears "a reasonable relationship" thereto, but, rather, we would find it "arbitrary and discriminatory." We reach these conclusions both because of the statute's total exclusion of the unmarried, and because of its palpable overbreadth with respect to the married.

So far as health is concerned, as Justices Whittemore and Cutter, dissenting in *Baird*, pointed out, "If there is need to have a physician prescribe (and a pharmacist dispense) contraceptives, that need is as great for unmarried persons as for married persons." 1969 Mass. A.S. at 738. But not only are their needs the same, their physical characteristics, and their individual responses to contraceptives must be the same. The court's quoted statement in *Sturgis* that the "prohibition against . . . distribution bears a real and substantial relation to the legislative purpose" is, with due respect, beside the mark, if the purpose is health. The court neglects the fact that the legislature has recognized that health does not require prohibition: a physician may safely prescribe for married persons. If the prohibition which the court supports is to be taken to mean that the same physician who can prescribe for married patients does not have sufficient skill to protect the health of patients who lack a marriage certificate, or who may be currently divorced, it is illogical to the point of irrationality. For reasons we will come to, we do not believe that health is the legislative purpose, but if it is, the statute is arbitrary, and by the same token, grossly discriminatory.

In addition, we must take notice that not all contraceptive devices risk "undesirable . . . [or] dangerous physical consequences." It is 200 years since Casanova recorded the ubiquitous article which, perhaps because of the birthplace of its inventor, he termed a "redingote anglais." The reputed nationality of the condom has now changed, but we have never heard criticism of it on the side of health. We cannot think that the legislature was unaware of it, or could have thought that it needed a medical prescription. We believe the same could be said of certain other products. Petitioner says this is true of vaginal foam. Since he failed to prove it, we cannot so find, but we may assume, broadly, that not all chemical compounds are inherently dangerous. The legislature made no attempt to distinguish, in the statutory restriction, between dangerous or possibly dangerous articles, and those which are medically harmless.

In this posture it is impossible to think of the statute as intended as a health measure for the unmarried, and it is almost as difficult to think of it as so intended even as to the married. If there could be any doubts, it is to be noted that health protection, even for the married, had no place prior to the 1966 amendment. The legislature intended just the opposite. Consistent with the fact that the statute was contained in a chapter dealing with "Crimes Against Chastity, Morality, Decency and Good Order," it was cast only in terms of morals. A physician was forbidden to prescribe contraceptives even when needed for the protection of health. *Commonwealth* v. *Gardner*, 1938, 300 Mass. 372. The court in Baird gave the reason for the change. "The amendment made by St. 1966, c. 265 [Section 21A, n. 1, ante] were brought about by the decision in *Griswold* v. *Connecticut*, 381 U.S. 479, which held unconstitutional as applied to married persons a statute prohibiting the use of contraceptives and the giving of advice

on the subject." 1969 Mass. A.S. at 729. On this record we do not believe that the legislature suddenly reversed its field and developed an interest in health. Rather, it merely made what it thought to be the precise accommodation necessary to escape the *Griswold* ruling.

Turning to the second contention, that the statute has a legitimate purpose to protect morals, the Commonwealth argues that lack of access to contraceptive materials will have a deterrent effect upon the commission of fornication, viz., sexual intercourse between consenting, unmarried adults. Fornication is a misdemeanor, entailing a thirty dollar fine, or three months in jail. Mass. G.L. c. 272 § 18. Violation of the present statute is a felony, punishable by five years in prison. We find it hard to believe that the legislature adopted a statute carrying a five-year penalty for its possible, obviously by no means fully effective, deterrence of the commission of a ninety-day misdemeanor. Here, again, we look to history. If the prevention of fornication was the true statutory aim, there never was a reason to deny access to contraceptive materials to married persons. Yet, as we have noted, until *Griswold* the married as well as the unmarried were equally proscribed. We are led inevitably to the conclusion that, so far as morals are concerned, it is contraceptives per se that are considered immoral — to the extent that *Griswold* will permit such a declaration.

To say that contraceptives are immoral as such, and are to be forbidden to unmarried persons who will nevertheless persist in having intercourse, means that such persons must risk for themselves an unwanted pregnancy, for the child, illegitimacy, and for society, a possible obligation of support. Such a view of morality is not only the very mirror image of sensible legislation; we consider

that it conflicts with fundamental human rights. In the absence of demonstrated harm, we hold it is beyond the competency of the state. See the various opinions in *Griswold* v. *Connecticut*, ante, particularly those of Mr. Justice Harlan and Mr. Justice White, concurring. *See also Richards* v. *Thurston*, 1 Cir., 4/28/70.

To preserve the statute as one directed towards health would necessitate judicial excision of the expressed distinction between unmarried and married users. Even then, there would be difficulties. Deletion of unsupportable overbreadth, encompassing articles not reasonably believed dangerous to health, would leave the statute with an element of vagueness, a burden we would be reluctant to impose upon the fundamental rights at stake here. *Aptheker* v. *Secretary of State*, 1964, 378 U.S. 500, 515-17; *see Bouie* v. *City of Columbia*, 1964, 378 U.S. 347, 362. Where the statute, prior to its amendment, advanced no constitutionally permissible objective, and the amendment revealed no purpose except to preserve as much of the statute as possible in the face of supervening judicial authority, we must conclude that any finding of proper purpose would be mere pretense. *Ct. Ho Ah Kow* v. *Nunan*, C.C.Cal., 1879, 5 Sawyer 552, 12 Fed. Cas. 252. We see no basis for a presumption in the statute's favor, *see United States* v. *O'Brien*, 1968, 391 U.S. 367, 383; *Goesaert* v. *Cleary*, 1948, 335 U.S. 464, or any reason why we should interpret it or attempt to remold it to achieve some other, legitimate objective.[3]

[3] For a discussion of presumptions of permissible purpose, see Note, Legislative Purpose and Federal Constitutional Adjudication, 83 Harv. L. Rev. 1887 (1970), centering around *United States* v. *O'Brien*, ante. It is true that in *O'Brien* the Court refused to invalidate a statute on the basis of an allegation of improper purpose based in part on what occurred on the floor of Congress during its passage. In *O'Brien* the Court pointed out that the statute was constitutional on its face. The present statute is not, and cannot be legitimized without both excision and revi-

In so holding we in no way suggest that the legislature may not enact a statute appropriately directed toward the protection of health, to guard married and unmarried persons alike. We observe further, that if the legislature is truly concerned with deterring fornication, it may increase the statutory penalty to mark the measure of its concern. It may not do so, however, by making the penalty a personally, and socially, undesired pregnancy.

Finally, the Commonwealth says that petitioner has not shown that his own constitutional rights have been violated, and therefore that he has no standing to attack the statute. If only some application of the statute were constitutionally unwarranted, there might be merit in this position. We, however, have held the statute itself void. Petitioner is being jailed for a direct violation of that statute; he must have as much standing to protest as anyone else. In this connection we observe that by criticizing him for not seeking declaratory relief instead of acting so as to invite arrest, the Massachusetts court implicitly recognized petitioner's standing and interest. 1969 Mass. A.S. at 735. We will do no less. The order of the District Court is vacated, and the action remanded thereto with instructions to grant the writ discharging the petitioner.

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sion. Where such action on our part would have to be undertaken in the light of a statutorily demonstrated impermissible intent, we consider the *O'Brien* teaching to be inapposite.

Appendix B.

WILLIAM R. BAIRD,
Petitioner
v.
THOMAS S. EISENSTADT, AS HE IS SHERIFF OF SUFFOLK COUNTY, MASSACHUSETTS,
Respondent

Misc. Civ. No. 70-16
UNITED STATES DISTRICT COURT,
DISTRICT OF MASSACHUSETTS
310 F. Supp. 951 (1970)

JULIAN, District Judge.

William R. Baird, who is presently in the custody of the respondent serving a three-month sentence imposed by the Massachusetts courts, filed this petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241 claiming that he is in custody in violation of the Constitution of the United States.

The facts are briefly these: The petitioner, pursuant to invitation, addressed a group of approximately 2,000 students in Hayden Auditorium at Boston University on April 6, 1967. The address was approximately one hour in length and consisted of a discussion of various contraceptive devices, displayed with diagrams on two demonstration boards or contained in a cardboard box, and an exposition of their respective merits. During the address he stated that he was violating the statute and invited arrest. At the close the petitioner invited the members of the audience to come to the stage and to help themselves to the contraceptive articles. The petitioner personally handed to a young lady a package of Emko vaginal foam,

an admittedly contraceptive substance. The petitioner was thereupon arrested by a police officer and taken to police headquarters.

Petitioner was prosecuted and convicted in the Massachusetts Superior Court on two indictments charging violations of Mass. G.L. c. 272, § 21, one for unlawfully exhibiting certain articles for the prevention of conception, the other for unlawfully giving away an article for the prevention of conception. On appeal the Supreme Judicial Court reversed the conviction for exhibiting the articles,[1] but affirmed the conviction for giving away the article.[2] Petitioner was thereupon sentenced to imprisonment for the term of three months. On January 12, 1970, the Supreme Court of the United States denied certiorari. Baird v. Massachusetts, 369 U.S. 1029, 90 S.Ct. 580, 24 L.Ed.2d 524

The material part of Mass. G.L. c. 272, § 21, as amended through St. 1966, c. 265, § 3, is:

> "Except as provided in section twenty-one A. whoever sells, lends, gives away, exhibits, or offers to sell, lend or give away * * * any drug, medicine, instrument or article whatever for the prevention of conception or for causing unlawful abortion * * * shall be punished by imprisonment in the state prison for not more than five years or in jail or the house of correction for not more than two and one half years or by a fine of not less than one hundred nor more than one thousand dollars."

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[1] The Court found the display of the articles "essential to a graphic representation of his subject." It thereupon held that: "delivery of the lecture was an exercise of a right of free speech which has First Amendment protection. To the extent that Sec. 21 prohibits exhibiting, it is unconstitutional as applied to the defendant in this case."

[2] 247 N.E. 2d 574.

The exception in § 21 referring to § 21A was inserted by St. 1966, c. 265, § 3.[3] Section 21A was set forth in c. 265, § 1 which reads in relevant part:

> "A registered physician may administer to or prescribe for any married person drugs or articles intended for the prevention of pregnancy or conception. A registered pharmacist actually engaged in the business of pharmacy may furnish such drugs or articles to any married person presenting a prescription from a registered physician. A public health agency, a registered nurse, or a maternity health clinic operated by or in an accredited hospital may furnish information to any married person as to where professional advice regarding such drugs or articles may be lawfully obtained."

The Supreme Judicial Court considered the effect of Griswold v. Connecticut, 1965, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510, and of St. 1966, c. 265, upon § 21 and concluded that "[t]he *Griswold* case and the ensuing statutory amendments swept away the ground of decision in Commonwealth v. Gardner, 300 Mass. 372, 15 N.E.2d 222 (1938), which upheld convictions of individuals who were charged with selling or giving contraceptives to married women even if 'intended to be used for the prevention of conception only upon prescription by a duly qualified physician when necessary for the preservation of life or health according to sound and generally accepted medical practice' (p. 374, 15 N.E.2d p. 223). They did not, however, repeal the prohibition against laymen furnishing information or providing contraceptives, and they did not enlarge the

[3] Chapter 265 of St. 1966 is entitled "An Act authorizing registered physicians or pharmacists to furnish drugs or articles for the prevention of pregnancy or conception."

group who might be so informed or thus provided. Unmarried individuals are still excluded. There is nothing in § 21 purporting to prohibit giving advice, discussing, or lecturing on the subject of contraceptives." This construction by the highest Court of Massachusetts is binding upon this Court, so that factually petitioner's conduct is clearly proscribed by statute. No showing was made either in the State courts or before this Court that petitioner has ever been a physician or pharmacist or was otherwise professionally qualified to prescribe or dispense contraceptives.

To support his position, petitioner presents several constitutional arguments: that the statute lacks a legitimate legislative purpose; that it infringes his right of free speech; that it is unconstitutionally vague; that it is not severable; and that it violates a right of privacy.

Considering his arguments *seriatim*, the first question is whether there is a legitimate legislative purpose justifying the statute. On this issue the Supreme Judicial Court stated:

> "Since St.1879, c. 159, § 1, the public policy of this Commonwealth, as legislatively declared, has included a prohibition against distribution of articles for the prevention of conception. Not until the recent amendment by St.1966, c. 265, § 3, was any exception made in favor of doctors and others who by training or occupation might be deemed to have acquired a special qualification as distributors. The Commonwealth has a legitimate interest in preventing the distribution of articles designed to prevent conception which may have undesirable, if not dangerous, physical consequences.
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> "Therefore, we do not declare that a statute preventing distribution by indiscriminate persons is beyond

> legislative power. Unlike the legislation in Coffee-Rich, Inc. v. Commissioner of Pub. Health, 348 Mass. 414, 424–426, 204 N.E.2d 281, the prohibition in § 21, as applied to the defendant [petitioner] in this case, is directly related to a legitimate legislative purpose. The legitimacy of the purpose depends upon a distinction as to the distributor and not as to the marital status of the recipient."

247 N.E.2d at 578. This Court accepts as valid and binding the construction placed upon § 21 by the State court.

Had § 21A authorized registered physicians to administer or prescribe contraceptives for unmarried as well as for married persons, the legal position of the petitioner would not have been in any way altered. Not being a physician he would still have been prohibited by § 21 from "giving away" the contraceptive.

A legislature has the constitutional power to limit the practice of medicine to qualified physicians. The statutes under attack deal with the distribution of contraceptive drugs and devices. It is a matter of common knowledge that contraceptive substances may have harmful effects on the health of those who use them and for that reason are still the subject of extensive medical research.[4] The statutes in question have a clear relationship to the legislative purpose of safeguarding the health of members of the community by placing the distribution of such substances exclusively in the hands of registered physicians and pharmacists. The statutes therefore can reasonably be regarded as furthering an important and substantial governmental interest.

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[4] In his Memorandum in support of the issuance of the writ the petitioner claims that the contraceptive substance he delivered to the young woman was "a safe and medically approved article." No such finding was made by the State courts; there is no basis in the record for such a finding by this Court.

Petitioner claims that the "giving away" of the contraceptive was constitutionally protected protest and speech. This Court, however, adopts the view taken by the Supreme Judicial Court that the bestowal of the contraceptive upon the young woman in the audience "added nothing to the understanding of the lecture, and was not an exercise of a right guaranteed under the First Amendment." This conclusion is in accord with recent pronouncements made by the Supreme Court of the United States in this area of constitutional law. Thus, in Cox v. Louisiana, 1965, 379 U.S. 536, 555, 85 S.Ct. 453, 464, 13 L.Ed.2d 471, the Court stated:

> "We emphatically reject the notion urged by appellant that the First and Fourteenth Amendments afford the same kind of freedom to those who would communicate ideas by conduct such as patrolling, marching, and picketing on streets and highways, as these amendments afford to those who communicate ideas by pure speech. * * * We reaffirm the statement of the Court in Giboney v. Empire Storage & Ice Co., *supra*, 336 U.S. [490] at 502, 69 S.Ct. at 691, [93 L.Ed. 834], that 'it has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written or printed.' "

And again in United States v. O'Brien, 1968, 391 U.S. 367, 376–377, 88 S.Ct. 1673, 1678, 20 L.Ed.2d 672:

> "O'Brien first argues that the 1965 Amendment is unconstitutional as applied to him because his act of burning his registration certificate was protected 'symbolic speech' within the First Amendment. His argument is that the freedom of expression which the First

Amendment guarantees includes all modes of 'communication of ideas by conduct,' and that his conduct is within this definition because he did it in 'demonstration against the war and against the draft.'

"We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea. However, even on the assumption that the alleged communicative element in O'Brien's conduct is sufficient to bring into play the First Amendment, it does not necessarily follow that the destruction of a registration certificate is constitutionally protected activity. This Court has held that when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms. To characterize the quality of the governmental interest which must appear, the Court has employed a variety of descriptive terms: compelling; substantial; subordinating; paramount; cogent; strong. Whatever imprecision inheres in these terms, we think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." [Footnotes omitted.]

Sections 21 and 21A meet all these requirements. First, from the discussion above it should be clear that a legitimate purpose of the statute was to safeguard the health

of citizens, unmistakably a traditional police power objective. Second, prohibiting the "giving away" of contraceptives is manifestly "unrelated to the suppression of free expression." Finally, the restriction on alleged First Amendment freedoms is, at best incidental. The petitioner was not convicted for any beliefs or views that he espoused or urged upon others, nor for exercising his right of free speech or of assembly, nor for any intellectual, moral, or other opposition he may have expressed against the Massachusetts statutes in question. He stands convicted solely for "giving away" a certain contraceptive medicine or article in violation of § 21.

Petitioner next attacks the validity of § 21 on the ground that it has been so "eroded" during the past half century as to be now "constitutionally vague." Petitioner, however, overlooks the fact that § 21 was reconsidered and acted upon by the Massachusetts Legislature as recently as 1966, when it inserted § 21A and amended § 21 (St.1966, c. 265, §§ 1 and 3) in order to bring § 21 into compliance with the decision of the Supreme Court of the United States in *Griswold, supra,* which had been handed down in 1965. The statutory provisions, as amended by the legislature and construed by the Supreme Judicial Court, are sufficiently clear to provide ascertainable standards of conduct and do not curtail or inhibit the exercise of individual freedoms protected by the Constitution. Cf. Baggett v. Bullitt, 1964, 377 U.S. 360, 84 S.Ct. 1316, 12 L. Ed.2d 377. The statutes are not constitutionally vague.

Petitioner further contends that "the prohibition of distributing found in § 21 is not severable from invalid portions of the section." The several acts prohibited by § 21 are stated in the disjunctive. Exhibiting is a distinct concept from selling, lending or giving away; and the prohibition against exhibiting can be eliminated when it conflicts with the First Amendment right of free speech without im-

pairing the significance of the prohibition against selling, lending or giving away. The Supreme Judicial Court effectively disposes of the petitioner's contention as follows:

> "The only word which is affected by this opinion is 'exhibits' as it applies to the defendant in giving the lecture. It may be constitutional in its application to others. This does not render it doubtful whether the Legislature would enact the balance of the statute, as in Pedlosky v. Massachusetts Inst. of Technology, 352 Mass. 127, 224 N.E.2d 414. In contemplation of the history of the statute, both remote and recent, we do not believe that the Legislature would prefer to have the entire statute fall if under the First Amendment the word 'exhibits' cannot stand, nor do we believe that in that circumstance they would prefer to treat as innocuous the other acts set forth in § 21:—selling or leading or giving away or offering to sell, lend or give away any of the prohibited articles."

247 N.E.2d at 579. This Court adopts this position.

Petitioner's remaining contentions is that the prohibition in § 21 against the giving away of contraceptives violates "the right of privacy." For this proposition he relies on *Griswold, supra*. In *Griswold* it was held that a Connecticut statute forbidding the *use* of contraceptives violated the right of marital privacy which is fundamental and basic and within the "penumbra" of specific guarantees of the Bill of Rights. "Marriage," observes the Court, "is an association for as noble a purpose as any involved in our prior decisions." 381 U.S. at 486, 85 S.Ct. at 1682. The Court further held that the appellants, who were physicians and prosecuted for giving medical advice to married persons as to the means of preventing conception, had standing to assert the constitutional rights of the married people

with whom they had a professional relationship. The use of contraceptives by married persons is not prohibited by any Massachusetts statute, and their distribution to such persons by registered physicians and pharmacists is authorized by § 21A. No violation of the right of marital privacy is involved in this case.

There is no statute in Massachusetts which makes it a crime for an unmarried person to *use* a contraceptive. Section 21, read with § 21A, however, prohibits everyone in Massachusetts, including registered physicians and pharmacists, from distributing contraceptives to unmarried persons. Another statute, Mass.G.L. c. 272, § 18, prohibits sexual intercourse between a man and an unmarried woman. The constitutionality of the latter statute is not challenged and was not litigated in the State court or in this Court.

Except as stated in the following quotation from page 3 of his Memorandum, petitioner does not specify what or whose right of privacy is being violated with reference to unmarried persons:

> "We are talking here not of the right to fornicate, not of the right to commit incest or adultery, nor of the right to be unchaste * * *; several laws exist for the prevention of these acts which are not in issue in this case. Instead, we are talking of the right of the individual to control his or her most private bodily functions."

The commission of fornication, incest or adultery necessarily involves the "most private bodily functions." All three acts are crimes under Massachusetts statutes, Mass. G.L. c. 272, §§ 14, 17 and 18. It has never been held, nor does petitioner suggest that it is beyond the constitutional powers of the State to punish such conduct as criminal.

Nor has it ever been held that a constitutional right of privacy shields acts of adultery, incest or fornication against intrusion by the State.

This Court, however, need not decide whether §§ 21 and 21A as construed by the Supreme Judicial Court violate some constitutional right of registered physicians in their professional relationship with unmarried patients, or of unmarried persons themselves. These questions are not presented by the facts in this case. The petitioner is not a physician and has no express or implied authority to act for physician. It does not appear that he himself is an unmarried person or has any professional or other legally significant relationship to unmarried persons. Therefore he lacks standing to assert the constitutional rights of either group.

Petitioner would have standing if a violation of his own right of privacy were involved; but in the circumstances of this case his prosecution for distributing a contraceptive substance to a person with whom he had no legally significant relationship is not an invasion of any right of privacy he can properly claim as his own.

This Court agrees with the holding of the Supreme Judicial Court that § 21 is constitutional as construed by that Court and as applied to the petitioner in the case for unlawfully giving away an article for the prevention of conception.

The Court finds and rules that the petitioner is not in custody in violation of the Constitution and laws of the United States. Therefore, in accordance with the provisions of 28 U.S.C. § 2254(a), the petition is dismissed.

Appendix C.

COMMONWEALTH
v.
WILLIAM R. BAIRD.

SUPREME JUDICIAL COURT OF MASSACHUSETTS.
1969 Mass. Adv. Sh. 727, 247 N.E. 2d 574 (1969).

WILKINS, C.J. These are two indictments charging violations of G. L. c. 272, § 21, one (No. 29,688) for unlawfully giving away a certain medicine and article for the prevention of conception, the other (No. 29,689) for unlawfully exhibiting certain articles for the prevention of conception, both being not in accordance with G. L. c. 272, § 21A. The evidence shows that these acts occurred during, and incidental to, a lecture to students in an auditorium of an educational institution. The case, along with two motions to dismiss based on constitutional grounds, was heard by a judge of the Superior Court sitting without jury.

The defendant, pursuant to invitation, addressed a group of approximately 2,000 students in Hayden Auditorium at Boston University on April 6, 1967. The address was approximately one hour in length and consisted of a discussion of various contraceptive devices displayed with diagrams on two demonstration boards or contained in a cardboard box and with an exposition of their respective merits. During the address he stated that he was violating the

statute and invited arrest. At the close the defendant invited the members of the audience to come to the stage and to help themselves to the contraceptive articles. The defendant personally handed to a young lady a package of Emko vaginal foam, an admittedly contraceptive substance. At this point a police officer told the defendant to call his attorney to the stage and to "wind it up." The defendant was then taken to police headquarters in company with his attorney, who remained with him.

Following arguments, the judge made a finding of guilty, and denied the motions to dismiss. Being of the opinion that the defendant's motions raise questions of law which are both doubtful and important and require decision by the Supreme Judicial Court, he reported the case in accordance with G. L. c. 278, § 30, both parties assenting thereto. The report incorporates by reference the stenographic record and the exhibits, and contains all the material facts necessary for a review of the following question of law: Are the provisions of G. L. c. 272, § 21, constitutional?

The material part of G. L. c. 272, § 21, as amended through St. 1966, c. 265, § 3, is: "Except as provided in section twenty-one A, whoever sells, lends, gives away, exhibits, or offers to sell, lend or give away . . . any drug, medicine, instrument or article whatever for the prevention of conception or for causing unlawful abortion . . . shall be punished by imprisonment in the state prison for not more than five years or in jail or the house of correction for not more than two and one half years or by a fine of not less than one hundred nor more than one thousand dollars."

The exception in § 21 referring to § 21A was inserted by St. 1966, c. 265, § 3. Section 21A was set forth in c. 265, § 1, which reads in part: "A registered physician may administer to or prescribe for any married person drugs or articles intended for the prevention of pregnancy or conception. A registered pharmacist actually engaged in the business of pharmacy may furnish such drugs or articles to any married person presenting a prescription from a registered physician. A public health agency, a registered nurse, or a maternity health clinic operated by or in an accredited

hospital may furnish information to any married person as to where professional advice regarding such drugs or articles may be lawfully obtained."

The amendments made by St. 1966, c. 265, were brought about by the decision in *Griswold* v. *Connecticut*, 381 U. S. 479, which held unconstitutional as applied to married persons a statute prohibiting the use of contraceptives and the giving of advice on the subject.

The *Griswold* case and the ensuing statutory amendments swept away the ground of decision in *Commonwealth* v. *Gardner*, 300 Mass. 372 (1938), which upheld convictions of individuals who were charged with selling or giving contraceptives to married women even if "intended to be used for the prevention of conception only upon prescription by a duly qualified physician when necessary for the preservation of life or health according to sound and generally accepted medical practice" (p. 374). They did not, however, repeal the prohibition against laymen furnishing information or providing contraceptives, and they did not enlarge the group who might be so informed or thus provided. Unmarried individuals are still excluded.

There is nothing in § 21 purporting to prohibit giving advice, discussing, or lecturing on the subject of contraceptives. The two indictments, both limited to § 21, understandably do not call into question anything that the defendant said, but charge that he unlawfully gave away "a certain medicine and article," and unlawfully exhibited "certain articles for the prevention of conception." The defendant contends that his acts must be classified as speech, and are within the protection of the First Amendment. *Cox* v. *Louisiana*, 379 U. S. 559, 563. See *Commonwealth* v. *Dubin*, 327 Mass. 681. Compare *United States* v. *O'Brien*, 391 U. S. 367, 376. But merely because his acts are so classified does not assure constitutional protection.

An aspect of speech which does not receive constitutional protection is obscenity. *Roth* v. *United States*, 354 U. S. 476, 484–485. In some earlier decisions in this Commonwealth dealing with contraception it can be inferred that obscenity was a basis. See, for example, *Commonwealth* v.

Allison, 227 Mass. 57 (1917), a prosecution under a predecessor statute of G. L. c. 272, § 21, for the advertising, publication, and distribution of birth control pamphlets, which were described (p. 60) as "too indecent to be spread upon the records." In that case it was stated (p. 62), "The distribution of obscene printing was indictable at common law"; and (pp. 61–62): "One test of obscenity has been said to be whether its tendency is 'to deprave and corrupt those whose minds are open to such immoral influences.' *The Queen* v. *Hicklin*, L. R. 3 Q. B. 360, 371."

In *Roth* v. *United States*, 354 U. S. 476, 489, the opinion of the court stated, "The *Hicklin* test, judging obscenity by the effect of isolated passages upon the most susceptible persons, might well encompass material legitimately treating with sex, and so it must be rejected as unconstitutionally restrictive of the freedoms of speech and press." The *Roth* test was accepted as binding by this court. See *Commonwealth* v. *Moniz*, 338 Mass. 442, 443; *Attorney Gen.* v. *"Tropic of Cancer,"* 345 Mass. 11, 13–20; *Attorney Gen.* v. *"John Cleland's Memoirs of a Woman of Pleasure,"* 349 Mass. 69, 70–72, revd. sub nom. *"John Cleland's Memoirs of a Woman of Pleasure"* v. *Attorney Gen. of Mass.* 383 U. S. 413.

In *"John Cleland's Memoirs of a Woman of Pleasure"* v. *Attorney Gen. of Mass.* 383 U. S. 413, 418, the majority opinion contained the following: "We defined obscenity in *Roth* in the following terms: '[W]hether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest.' 354 U. S., at 489. Under this definition, as elaborated in subsequent cases, three elements must coalesce: it must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value." The *Memoirs* case was treated as controlling in *Attorney Gen.* v. *"Naked Lunch,"* 351 Mass. 298, 299.

Tested by these standards, it cannot rightly be contended that the defendant's address was obscene in the constitutional sense. As was said in the *Roth* case, 354 U. S. at 484, "All ideas having even the slightest redeeming social importance — unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion — have the full protection of the guaranties, unless excludable because they encroach upon the limited area of more important interests." See *Commonwealth* v. *Moniz*, *supra*, 446; *Attorney Gen.* v. *"Tropic of Cancer"*, *supra*, 14".

There is another type of speech which does not have constitutional protection because it may "encroach upon the limited area of more important interests." This might apply if it is deemed "to create a clear and present danger" of substantive evil, to quote from Mr. Justice Holmes in *Schenck* v. *United States*, 249 U. S. 47, 52, or where "there . . . [is] reasonable ground to . . . [believe] that serious evil will result," to use the language of Mr. Justice Brandeis in his concurring opinion in *Whitney* v. *California*, 274 U. S. 357, 376. This is a subject fraught with difficulty for a State court, as the Justices have indicated in the past. See *Opinion of the Justices*, 349 Mass. 786, 791–793.

But where recent pronouncements of the Supreme Court of the United States seem to declare that the legislation may constitute an unwarranted interference with freedom of speech, it becomes our duty to ascertain, and apply, the meaning of those cases by which we are bound. This is the course we have endeavored to follow in the past. See *Commonwealth* v. *Pascone*, 308 Mass. 591, 594; *Commonwealth* v. *Gilfedder*, 321 Mass. 335, 339, 342; *Commonwealth* v. *Dubin*, 327 Mass. 681, 682–683.

In the *Griswold* case, 381 U. S. 479, the court's opinion stated (p. 482): ". . . [T]he State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge. The right of freedom of speech and press includes not only the right to utter or print, but the right to distribute, the right to receive, the right to read . . . and freedom of inquiry, freedom of thought, and freedom to teach . . ." The reference to

freedom of speech in the *Griswold* case was a basis of the decision of the Supreme Court of New Jersey in *State* v. *Baird*, 50 N. J. 376, 380, which reversed the conviction of the one who is the defendant in the case at bar. He was there charged with having "exposed to the view of others contraceptives used to prevent birth." This had occurred in a van on a parking lot. The court noted that the New Jersey statute merely forbade display or exposure if "without just cause," and said that there was no conduct suggestive of obscenity or of obtrusiveness, pandering and the like; and that "the display or exposure was made in inoffensive circumstances and was incidental to the good faith explanation of birth control to a woman who had made specific inquiry on the subject" (p. 379). The court also emphasized that the enumeration of rights quoted from the *Griswold* case furnished protection for the defendant's conduct; saying (p. 380), "the display and exposure of the contraceptive devices were part and parcel of the dissemination and merely served to illustrate and clarify the information being properly given and received."

As has been noted, the defendant was not indicted for anything he said. We have to consider whether the exhibition of contraceptive devices, for which he was indicted, was incidental to, and part of, the lecture, and thereby within the protection of the First Amendment. The display of those articles was essential to a graphic representation of his subject.

We are of opinion that delivery of the lecture was an exercise of a right of free speech which has First Amendment protection. To the extent that § 21 prohibits exhibiting, it is unconstitutional as applied to the defendant in this case.

The indictment which charges giving away an article "for the prevention of conception" stands on a different footing.[1] There do not appear to be decisions binding upon us which

[1] In *Griswold* v. *Connecticut*, 381 U. S. 479, see dissenting opinion of Stewart, J. at p. 529, fn. 3: "If all the appellants had done was to advise people that they thought the use of contraceptives was desirable, or even to counsel their use, the appellants would, of course, have a substantial First Amendment claim. But their activities went far beyond mere advocacy. They prescribed specific contraceptive devices and furnished patients with the prescribed contraceptive materials."

show that the charge would be held to be constitutionally invalid. Since St. 1879, c. 159, § 1, the public policy of this Commonwealth, as legislatively declared, has included a prohibition against distribution of articles for the prevention of conception. Not until the recent amendment by St. 1966, c. 265, § 3, was any exception made in favor of doctors and others who by training or occupation might be deemed to have acquired a special qualification as distributors. The Commonwealth has a legitimate interest in preventing the distribution of articles designed to prevent conception which may have undesirable, if not dangerous, physical consequences. In these circumstances, absent any definite intimation, we shall not guess as to the probable attitude of the Supreme Court of the United States.

Therefore, we do not declare that a statute preventing distribution by indiscriminate persons is beyond legislative power. Unlike the legislation in *Coffee-Rich, Inc.* v. *Commissioner of Pub. Health*, 348 Mass. 414, 424–426, the prohibition in § 21, as applied to the defendant in this case, is directly related to a legitimate legislative purpose. The legitimacy of the purpose depends upon a distinction as to the distributor and not as to the marital status of the recipient.

The bestowal of this item upon an individual in the audience added nothing to the understanding of the lecture, and was not an exercise of a right guaranteed under the First Amendment. We do not accept the argument advanced in a brief of an amicus curiae that the gift of the foam was one of the "appropriate types of action" embraced within the guaranty of freedom of speech as stated in *Brown* v. *Louisiana*, 383 U. S. 131, 142. See *United States* v. *O'Brien*, 391 U. S. 367, 376. If, as there also contended, it is "implementing conduct . . . in the nature of advocacy," a phrase quoted to us from *National Labor Relations Bd.* v. *International Longshoremen's Assn.* 332 F. 2d 992, 999 (4th Cir.), we shall leave such declaration to be made elsewhere.

Even accepting the statute as constitutional in prohibiting distribution, there still must be considered whether there has been a violation in this respect. It is argued that the

act of giving away the device should have been, but was not, accompanied by an intention that the article be used for the prevention of conception. See *Commonwealth* v. *Corbett*, 307 Mass. 7 (1940), which construed G. L. c. 272, § 21, and states (12n.), "As has been shown, the words of the statute require proof of intended use for an illegal purpose, and are not satisfied by mere incidental result." The contention is developed that on the evidence the distributor's intent could have been any of a variety of reasons, including inviting arrest in order to test the validity of the statute. But the judge made no findings on this point, and we are not able to do so. There is also nothing to show that unlawful use was intended by the recipient. See the *Corbett* case, *supra*, 10.

In the case last cited, the article, according to the opinion of the majority, had ambiguous purposes. Had it been advertised as for the prevention of conception, the defendant could have been convicted. *Commonwealth* v. *Goldberg*, 316 Mass. 563. In the case at bar, the foam, as found by the judge, was admittedly a contraceptive, and the plea in behalf of contraceptives presented in the defendant's address has an effect analogous to the advertising in the *Goldberg* case. There was enough to warrant a finding of guilty on the indictment for giving away.

The defendant also invokes the Eighth Amendment arguing that the imposition of the maximum permitted penalty of five years for a violation of § 21 would be cruel and unusual punishment. He stresses that the penalty prescribed is as severe, or more so, as any to be found in statutes creating other offences which are serious crimes. We quote examples which carry a sentence of five years: Misprision of treason. G. L. c. 264, § 3. Indecent assault and battery on child under fourteen. G. L. c. 265, § 13B. Burning of insured property with intent to defraud. G. L. c. 266, § 10. Unnatural and lascivious acts with child under sixteen. G. L. c. 272, § 35A. The maximum sentence for adultery is three years and that for fornication is three months.

The maximum sentence is extremely severe, particularly when compared with the sentences provided in birth control legislation of twenty-three States cited in the defendant's

brief, and with sentences for other crimes in this Commonwealth.

Since the defendant has not been sentenced, we decline further to discuss the [illegible] at this time. See *Commonwealth* v. *Leis*, [illegible].

The defendant contends that the prohibition against giving away is not separable from the other provisions of § 21 relating to violations of the First Amendment. The only word which is affected by this opinion is "exhibits" as it applies to the defendant in giving the lecture. It may be constitutional in its application to others. This does not render it doubtful whether the Legislature would enact the balance of the statute, as in *Pedlosky* v. *Massachusetts Inst. of Technology*, 352 Mass. 127. In contemplation of the history of the statute, both remote and recent, we do not believe that the Legislature would prefer to have the entire statute fall if under the First Amendment the word "exhibits" cannot stand, nor do we believe that in that circumstance they would prefer to treat as innocuous the other acts set forth in § 21:— selling or lending or giving away or offering to sell, lend or give away any of the prohibited articles.

The current dispute could have been more appropriately considered under proceedings for a declaratory decree. G. L. c. 231A. See *Mansfield Beauty Academy, Inc.* v. *Board of Registration of Hairdressers*, 326 Mass. 624. The choice of openly challenging the criminal law was unnecessary if the purpose was merely to test the statute and not for some other purpose, such as compelling public attention. See *State* v. *Baird*, 50 N. J. 376, 378–379.

From the fact that we rest this decision wholly upon the Federal Constitution and largely upon its construction by the Supreme Court of the United States, no inference should be drawn that the Declaration of Rights of the Constitution of the Commonwealth is less capable of protecting the essentials of freedom of speech, of the press, and of assembly than is the Federal Constitution. *Commonwealth* v. *Gilfedder*, 321 Mass. 335, 343.

* Mass. Adv. Sh. (1969) 97, 106–107.

In answer to the question we state: G. L. c. 272, § 21, is unconstitutional as applied to the defendant in case No. 29,689, for unlawfully exhibiting certain articles for the prevention of conception, but § 21 is constitutional as applied to the defendant in case No. 29,688, for unlawfully giving away a certain medicine and article for the prevention of conception.

So ordered.

WHITTEMORE and CUTTER, JJ. (dissenting in part). 1. We concur in the first part of the majority opinion, viz. that Baird cannot be convicted constitutionally under § 21 for unlawfully exhibiting contraceptive articles. We also agree that raising these issues of constitutionality by declaratory proceedings would have been more appropriate than the course pursued by Baird.

2. We concur with what Mr. Justice Spiegel says in point First (set out in the fourth paragraph) of his dissenting opinion concerning the propriety of treating Baird's distribution of articles as constitutionally protected protest and speech.

3. We dissent from so much of the majority opinion as holds that Baird may be convicted under § 21 of distributing contraceptive articles, because we think (a) that § 21, read with § 21A, has been so much eroded in the last half century as to be now unconstitutionally vague, and (b) that the prohibition of distributing found in § 21 is not severable from invalid portions of the section.

First — Section 21 was designed (see *Commonwealth* v. *Allison*, 227 Mass. 57, 62, concerning a predecessor statute) to prohibit essentially all assistance of birth control. The section was described in *Commonwealth* v. *Gardner*, 300 Mass. 372, 374–375, as "plain, unequivocal and peremptory" and as containing "no exceptions." Its scope, however, has been cut down greatly since the *Allison* decision in 1917 in the following ways.

(1) In *Commonwealth* v. *Corbett*, 307 Mass. 7, 12, it was held that there could not be a conviction under § 21 for the sale of an article, susceptible of use to prevent disease as

well as for contraception, without proof that, in a particular case, the latter use was intended.

(2) Any use of the statute to prohibit serious discussion and assistance of birth control by speech, on the ground that it is inherently obscene, has become constitutionally impossible because of decisions of the Supreme Court of the United States referred to in the first part of the majority opinion.

(3) *Griswold* v. *Connecticut*, 381 U. S. 479, has greatly limited the possible application of § 21.

(4) The enactment of § 21A has permitted, subject to some limitations, the furnishing (by specified persons) of contraceptive articles and information to married persons.

(5) It remains uncertain to what extent § 21 may be constitutionally applied to prohibit advertising and manufacturing of contraceptives.

(6) The opinion in the present case concerning the invalidity of the prohibition of exhibiting contraceptives makes unenforceable a major provision of § 21. We think that the statutory prohibition of exhibiting necessarily applies to so many persons and so invades their freedom of speech as to make this prohibition unconstitutional on its face.

The consequence of these inroads or possible inroads on § 21 leaves it, when read with § 21A, of highly uncertain content and scope. We regard what remains of § 21 as comparable to the statutes held void for vagueness in *Alegata* v. *Commonwealth*, 353 Mass. 287, 293, 297–298, 300–301.[a] See *Hall-Omar Baking Co.* v. *Commissioner of Labor & Indus.* 344 Mass. 695, 708.

Second — It is also uncertain what legislative purpose now supports § 21, read with § 21A.

(1) Any valid purpose to suppress obscenity is gone, as the majority opinion shows.

(2) Any general purpose to prevent birth control no longer exists as a result of § 21A.

(3) To say that the legislative purpose is to restrain nonmarital intercourse would attribute to the Legislature an intention to use the risk of pregnancy as a deterrent to, or

[a] Mass. Adv. Sh. (1967) 1457, 1462, 1465–1467, 1469–1470.

punishment of, such intercourse. To do so would be contrary to the result and reasoning in *Commonwealth* v. *Corbett*, 307 Mass. 7, 8–12. See *State* v. *Baird*, 50 N. J. 376, 383. For reasons pointed out by Mr. Justice Spiegel in his dissent, with which we agree in large measure, the damage caused by an undesired pregnancy to the unmarried parents, to the unwanted child, and to society as a whole, is so disproportionate to any possible benefit as to raise grave constitutional doubts about the validity of such a deterrent if intended.

(4) We see in § 21 and § 21A, read together, no public health purpose. If there is need to have a physician prescribe (and a pharmacist dispense) contraceptives, that need is as great for unmarried persons as for married persons. This circumstance suggests that the only purpose of § 21A was to meet what were believed to be the minimal requirements of the *Griswold* case, 381 U. S. 479.

All these considerations lead us to the conclusion that the crimes originally defined in § 21, and the legislative purposes originally there reflected, are largely gone. There seems to us to be no rational basis for using what little is left of a statute designed to prevent all assistance of all birth control merely to deter nonmarital intercourse. We also see no such basis for severing and separately applying the prohibition of distributing contraceptives, when what remains of the statute of which this prohibition forms a part has become so uncertain. See *Pedlosky* v. *Massachusetts Inst. of Technology*, 352 Mass. 127.

SPIEGEL, J. (dissenting in part) I agree with the opinion with respect to the indictment charging the defendant with unlawfully exhibiting "certain articles for the prevention of conception."

I agree also that proceedings for declaratory relief would have been far preferable to this needless public demonstration. Such proceedings would have been an orderly method of raising the substantial constitutional issues and could have been so framed in behalf of persons having unquestioned standing as to present adequate facts for adjudication.

I do not concur with the majority's views on the indict-

ment for "unlawfully . . . [giving] away a certain medicine and article for the prevention of conception."

First, I am unable to discern the distinction the majority draw between the defendant's *exhibiting* and the defendant's *distributing*. As the opinion points out "these acts occurred during, and incidental to, a lecture to students." Each of these acts was "implementing conduct . . . in the nature of advocacy." *National Labor Relations Bd.* v. *International Longshoremen's Assn.* 332 F. 2d 992, 999 (4th Cir.). Basically the distribution should be considered part of constitutionally free speech and protest. See *Cox* v. *Louisiana*, 379 U. S. 536.

Second, I do not believe that §§ 21 and 21A reveal the "legitimate legislative purpose" claimed by the majority. The Legislature undoubtedly has the right to protect the health and safety of the public. However, I cannot infer or determine such an intent from a statute which limits the procurement of contraceptive devices to married persons. The adoption of § 21A permitting married persons to receive birth control devices with a prescription can only be interpreted as an attempt to save §§ 20 and 21 from the edict of the Supreme Court of the United States in the case of *Griswold* v. *Connecticut*, 381 U. S. 479. It is at best a strained conception to say that the Legislature intended to prevent the distribution of articles "which may have undesirable, if not dangerous, physical consequences." If that was the Legislature's goal, § 21 is not required. See G. L. c. 94, § 187A; Federal Food, Drug & Cosmetic Act, 21 U. S. C. § 353 (1964).

Nor do I believe that the purposes set forth by this court over fifty years ago in the case of *Commonwealth* v. *Allison*, 227 Mass. 57, 62, are valid today.[1] Even if we disregard the mores of the era in which we live, intervening Federal decisions have overridden any intended desire to control

[1] "Manifestly . . . [the statutes] are designed to promote the public morals and in a broad sense the public health and safety. Their plain purpose is to protect purity, to preserve chastity, to encourage continence and self restraint, to defend the sanctity of the home, and thus to engender in the State and nation a virile and virtuous race of men and women." *Commonwealth* v. *Allison*, *supra*, at 62.

contraceptive information as obscenity. The recent exception for married persons eliminates the propagation of a "virile and virtuous race" as a likely legislative purpose. In the case of *Commonwealth* v. *Corbett*, 307 Mass. 7, 8–9, this court rejected as a legislative purpose of § 21 the punishment of illicit sexual intercourse. Although in that case reference was made to the "spread[ing] unchecked" of venereal disease, we should also reject the thesis that "the Legislature intended pregnancy . . . to serve either as a restraint upon illicit affairs or as punishment for them." *State* v. *Baird*, 50 N. J. 376, 383. I am not convinced that the Legislature intended to risk the undesirable effects of an unwanted pregnancy. See U. Anderson and others, The Medical, Social, and Educational Implications of the Increase of Out-of-Wedlock Births, 56 Am. J. Pub. Health, p. 1866 (1966); U. S. Bureau of Public Assistance, Illegitimacy and Its Impact on the Aid to Dependent Children Program (1960); Fox, Abortion Deaths in California, 98 Am. J. Obstet. & Gyne. p. 645 (1967). The serious risk of an undesired pregnancy and the unwanted child, disastrous alike to the married as to the unmarried parents and to society as a whole, is utterly disproportionate in harm to any slight public benefit to be gained from a probably ineffective attempt to discourage fornication. It seems to me that § 21 arbitrarily and capriciously affects individual liberties and freedom of behavior and bears no "reasonable relation to some purpose within the competency of the State." See *Sperry & Hutchinson Co.* v. *Director of the Div. on the Necessaries of Life*, 307 Mass. 408, 418; *Mansfield Beauty Academy, Inc.* v. *Board of Registration of Hairdressers*, 326 Mass. 624, 627; *Coffee-Rich, Inc.* v. *Commissioner of Pub. Health*, 348 Mass. 414, 422–425; *Meyer* v. *Nebraska*, 262 U. S. 390, 399–400; *Griswold* v. *Connecticut*, 381 U. S. 479, 485.

Third, even if I were not concerned with the two previous points discussed, I am convinced that the question of distribution cannot be severed from the other provision of § 21 which the majority agree is unconstitutional. See *Pedlosky* v. *Massachusetts Inst. of Technology*, 352 Mass. 127. I am

not satisfied that the "only word which is affected by . . . [the majority] opinion is 'exhibits' as it applies to the defendant in giving the lecture." As used in the section, the word is "vague and uncertain" (see *Herndon* v. *Lowry*, 301 U. S. 242, 259) and has a "chilling effect upon the exercise of First Amendment rights." See *Dombrowski* v. *Pfister*, 380 U. S. 479, 487, 490-492. In addition, I think that the opinion casts grave doubts on the constitutionality of the portions of § 21 which prohibit advertising and printing, to say nothing of its effect on § 20 as it relates to contraceptive devices. Furthermore, the distinction drawn by the Legislature between married and unmarried persons is of questionable validity. Such a distinction cannot be read out of the statute. Cf. *Commonwealth* v. *Gardner*, 300 Mass. 372, 377. Even without the distinction the original purposes of § 21 can no longer be carried out by the section as amended by the Legislature and interpreted by this court. Its scope of application is indefinite and vague (see *Alegata* v. *Commonwealth*, 353 Mass. 287[a]) and is a "hodgepodge" of uncertainties. See *Hall-Omar Baking Co.* v. *Commissioner of Labor & Indus.* 344 Mass. 695.

I am impelled to conclude that § 21 is incapable of being cut into segments which would be constitutionally valid without, in effect, performing judicial surgery.

Joseph J. Balliro for the defendant.

Joseph R. Nolan, Assistant District Attorney, for the Commonwealth.

Roger P. Staley, *Henry Herrmann* & *Robert S. Bowditch*, *Jr.*, for Planned Parenthood League of Massachusetts, amicus curiae, submitted a brief.

Robert B. Kent, for Civil Liberties Union of Massachusetts, amicus curiae, submitted a brief.

David S. Fitzpatrick & *Alexander B. Grannis*, of New York, for The National Emergency Civil Liberties Committee, amicus curiae, submitted a brief.

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[a] Mass. Adv. Sh. (1967) 1457.

Appendix D.

NOTICE OF APPEAL.
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT.

WILLIAM R. BAIRD, Petitioner, Appellant;	Court of Appeals No. 7578.
v.	
THOMAS S. EISENSTADT, As he is Sheriff of Suffolk County, Massachusetts, Respondent, Appellee.	District Court No. 70-16-J.

Notice of Appeal to the Supreme Court of the United States.

I. Notice is hereby given that Thomas S. Eisenstadt, as he is Sheriff of Suffolk County, Massachusetts, the Respondent, Appellee above-named, hereby appeals to the Supreme Court of the United States from the final order entered by the United States Court of Appeals for the First Circuit in the above-entitled action on July 6, 1970, granting a habeas corpus petition of the Appellant, William R. Baird, and reversing the order of the United States District Court for the District of Massachusetts, dismissing such petition.

This appeal is taken pursuant to 28 U.S.C. § 1254 (2).

Signed,

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